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Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts[†]

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A third restatement of conflicts would be a good thing. More than half the states have adopted the *Restatement (Second) of Conflict of Laws*¹ (“*Second Restatement*”), and, as many of us have pointed out, it has some drawbacks that sometimes lead courts astray. Of course, the scholars in the field have some pretty strong disagreements among ourselves about what, if anything, should replace the *Second Restatement*. I am confident, however, that whatever would emerge would retain the good features of the *Second Restatement* and get rid of some of its unfortunate echoes of the dreaded *Restatement of the Law of Conflict of Laws*.² Specifically, any new restatement would be almost certain to retain some degree of flexibility and require courts to attend to the policies that should govern choice-of-law cases, especially promotion of state interests and the protection of justified expectations.³ It might or might not contain presumptive rules (this is an obvious area of contention), but whatever presumptions it contains are likely to be better than the clunky, over- and underinclusive rules retained from the Vested Rights era. The one thing that might well be missing from a revised restatement is a factor that I consider crucial to choice-of-law determinations, but which has been disfavored by the courts and by many scholars and which was included in only an oblique form in the *Second Restatement*. I am speaking about better law.⁴

Better law is the invisible angel of conflicts law. It is the genie stuck in the bottle, unable to come out yet somehow performing its wonders silently and unnoticed. Only four or five states have adopted Leflar’s better law approach.⁵ The *Second Restatement* conspicuously leaves better law out of the list of choice-of-law factors in section 6.⁶ Larry Kramer, a scholar whose work in this area I find admirable and instructive, goes so far as to argue that consideration of better law may be unconstitutional forum favoritism.⁷ With its minority status, its rejection by the courts and most scholars, the intimation that it contravenes fundamental constitutional norms in a federal system, its exclusion from the majority approach enshrined in the *Second*

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1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

2. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934).

3. See Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437 (2000).

4. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

5. They are Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH & LEE L. REV. 357, 373 (1992).

6. SECOND RESTATEMENT, *supra* note 1, § 6.

7. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); see generally Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989).

Restatement, better law has a lot against it. Why then do I, and some others, persist in raising the issue?

I do so, not only because I believe substantive justice should be a crucial factor in conflicts law, alongside considerations of multistate justice, but because such considerations are actually part of the *Second Restatement*, settled practice in the courts, and recent proposals to modernize conflicts law. Better law is part of the way we approach conflicts but, for reasons that are understandable but not persuasive, we are loath to call it that. Better law influences us and it influences the courts, but we are reluctant to admit it. Rather than face the music, we ask ourselves and the judges who must adjudicate hard cases to pay no attention to the man behind the curtain, although we know he is not only there but is pulling the levers. It is time to draw back the curtain.

The *Second Restatement* includes as one of the section 6 factors the goal of furthering “basic policies underlying the particular field of law.”⁸ I have previously argued that this factor is “better law” in disguise.⁹ It is assumed, by both courts and the *Second Restatement*, that the basic policies of torts are compensation and deterrence and that the basic policy of contracts is protection of the will of the parties (a factor, by the way, that is so important that it is partly encompassed by a separate section 6 factor under the guise of protecting the “justified expectations” of the parties).¹⁰ I have argued and continue to believe that it is not possible to identify “basic policies” in whole fields of law beset by tension and competing principles without taking a substantive position on who should presumptively win. Such presumptions identify better law or substantive justice.

In torts, one might adopt a general policy of letting the loss lie where it falls and identify legal remedies for injurious conduct as exceptions to the policy that people should look out for themselves. In the conflicts field, we adopt the contrary presumption, and this is a plaintiff-favoring policy where conduct regulation is at issue (given that the injured victim is likely to be bringing the lawsuit). In effect, we accept that compensation should be awarded for harms unless an argument can be made that compensation is unfair or unwarranted or deterrence unnecessary.¹¹ In other words, we treat compensation as better law and ask whether there are reasons to deny relief

8. SECOND RESTATEMENT, *supra* note 1, § 6(2)(e).

9. See Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 735 (1990); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 45–49 (1989).

10. SECOND RESTATEMENT, *supra* note 1, § 6(2)(d).

11. Symeonides suggests that the law of the place of the injury should apply if occurrence of the injury was “objectively foreseeable” there and if the plaintiff asks for application of that law. Symeonides, *supra* note 3, at 450. Similarly, Louise Weinberg argues, to my mind persuasively, that we should accept that courts are likely to apply forum law when they can and for good reason. Forum policies promote substantive justice, as the forum sees it, and there is no reason to abandon forum justice unless multistate policy demands it. See Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 508 (2000). The effect of this argument is to inject considerations of substantive justice into the center of choice-of-law analysis, rather than allowing it to remain unexamined and unexpressed behind the curtain.

to plaintiffs, such as protecting the expectations of the defendant who acted in a defendant-protecting state and relied on the immunizing law of that state in shaping its conduct.

It is important to note that this presumption is arguably old-fashioned and goes against the grain of some recent law and legal scholarship. Economic analysis has practically taken over tort law scholarship in the law journals and almost every state has passed some kind of tort reform legislation. Some scholars argue that tort law should be viewed *only* as interested in efficient levels of deterrence and not geared toward compensatory or justice-seeking goals. Conflicts scholars and judges adjudicating conflicts cases, on the other hand, stubbornly (and in my view, quite rightly) maintain the notion that tort law is often oriented to compensation and that compensatory practices should be preferred, especially when injury is inflicted in a state with plaintiff-favoring law.

In contracts, both the *Second Restatement* and the courts assume that contracts ordinarily should be enforced and that promises relied upon should be vindicated. This places the burden of persuasion on the party wishing to avoid enforcement. Since plaintiffs in contracts cases are likely to be the ones seeking enforcement, we have an implied preference for plaintiff-favoring law in the contracts field, as well as the torts field. On the other hand, the application of the *Second Restatement* in the courts suggests that contracts that violate consumer protection laws should ordinarily not be enforced if the consumer contracted or purchased the goods or services at home and the law of the home state has a higher regulatory standard than the law where the defendant is located or acted.

Thus, contrary to some trends in contract law, both courts and conflicts scholars stubbornly adhere to the idea that freedom of contract has its limits and that regulation of consumer contracts, insurance contracts, employment contracts, and franchise contracts should be vindicated when the person protected by such laws contracts or fulfills the contract at home, regardless of whether the contract contains a choice-of-law clause which purports to avoid the protective legislation. As in the torts field, both courts and scholars in the conflicts field buck the trend in scholarship and find the interests of the state where the victim is located to have a strong interest in applying its protective law and limiting the reach of "freedom of contract."

Both cases and scholarship choose plaintiff-favoring law in torts and enforce contracts unless they involve consumer protection statutes. There is a settled consensus, in other words, that substantive judgments about what law is "better" matters in choice-of-law cases. In addition, multistate policy is interpreted in a similar light. When the plaintiff is located and injured in a plaintiff-favoring state, the courts will generally apply that law, even if the defendant acted in a defendant-protecting state. The sole exception occurs in situations where the defendant could not have reasonably foreseen that its conduct would cause injury in the plaintiff-favoring state.

This presumption was suggested by David Cavers¹² and is similarly adopted, in different forms, by both Symeon Symeonides¹³ and Louise Weinberg.¹⁴ Why do they, and most other conflicts scholars, agree with this solution?

One might argue that they have determined that the plaintiff-favoring state has a stronger interest in applying its law than does the defendant-protecting state in applying its law. But why should that be so? If the defendant acts in a defendant-protecting state and the plaintiff is injured in a plaintiff-protecting state, we have the quintessential true conflict. Why does the plaintiff prevail? In some cases, this is because the defendant could have foreseen that its conduct could cause injury in the plaintiff-protecting state and the plaintiff has no contacts whatsoever with the defendant-protecting state. But foreseeability of foreign consequences is not always thought to be enough to impose foreign obligations on an actor. After all, the Supreme Court has held that the foreseeability of harm elsewhere is usually not sufficient reason to grant a forum personal jurisdiction over a defendant; the Court likes to see the defendant "purposefully avail" itself of the privilege of doing business in the forum where it is being sued.¹⁵ I cannot escape the conclusion that a preference is being voiced for plaintiff-favoring law when the victim is injured in a plaintiff-protecting state. This preference is explicit in the *Second Restatement's* "basic policies" of compensation and deterrence and clearly favored by those like Symeonides who favor new, more nuanced presumptions, to replace the old *Second Restatement* ones.¹⁶ Although Weinberg favors a presumption of forum (as do I), she also suggests that this will ordinarily favor the plaintiff in torts cases, as well as vindicating law "enforcement," by which she means vindication of the basic tort policies of compensation and deterrence.¹⁷

In the contracts field as well, the movement toward acceptance of choice-of-law clauses, and even choice-of-forum clauses suggests a widespread belief, by both courts and scholars, that predictability is furthered by contract enforcement under chosen law. On the other hand, the courts (and most scholars) are quite reluctant to deprive consumers, insureds, and employees of the protective legislation of the places where they live and work. When someone protected by a regulatory law performs services or incurs an injury in a state that regulates contractual terms to protect people from unfair terms and unequal bargaining power, courts deciding conflicts cases routinely ignore choice-of-law clauses to vindicate those protective policies.¹⁸ These

12. See DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 139-47 (1965).

13. See Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 705-31 (1992).

14. See Louise Weinberg, *On Departing from Forum Law*, 35 MERCER LAW REV. 595 (1984).

15. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (stating that minimum contacts must have its basis in some "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws") (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

16. See Symeonides, *supra* note 3, at 453.

17. Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 600 (1984); see also Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

18. See, e.g., *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990); *Gate City Federal Savings & Loan Ass'n v. O'Connor*, 401 N.W.2d 448 (Minn. Ct. App. 1987).

rulings contradict the more deferential standards articulated by the Supreme Court in maritime cases where consumer protection laws are routinely ignored in favor of enforcement of choice-of-law and choice-of-forum clauses.¹⁹ This substantive difference places in plain view the substantive preference of most courts and scholars for choosing protective law rather than the law that enforces what are arguably unfair contract terms.

Again, protection of consumers, employees, and insureds not only furthers protective contract policies but reflects a judgment about multistate policy. Choice-of-law clauses are not enforceable if they violate the legal rights of those protected by regulatory law who act inside the regulatory state and any promises to the contrary do not create expectations on the part of the promisee that are "justified." They are not justified because a defendant who does business with a consumer in a state that protects that consumer must do business under the rules adopted by that state. Such a business has no right to expect to ignore the law of the place where it is doing business, no matter what rights the consumer purports to waive.

It seems, then, that both courts and conflicts scholars and (*sub rosa*) the *Second Restatement* itself consider as a relevant factor the achievement of substantive justice, otherwise known as promotion of the better law. We should make this explicit in order to debate substantively what the better law is.²⁰ If some law and economics scholars want us to presume that plaintiffs should lose torts cases, with some narrow exceptions, because they believe that generally losses should lie where they fall, then we need to know what our response is to this argument. Other scholars, including some doing economic analysis, argue strongly in favor of compensatory law in the torts field.²¹ If defendant-protecting tort policies are "better" from the standpoints of either justice or utility or if they are more widely accepted by the courts, then perhaps defendants should win more conflicts cases and take the benefit of the defendant-protecting law of the states where they do business and where they act. But if defendant-protecting policies are not presumptively better in the torts area, we should defend the assumption that defendants should not be able to inflict injury on hapless plaintiffs in plaintiff-protecting states without complying with the protective laws of those states. Similarly, in the contracts field, if freedom of contract policies lose their legitimacy when less powerful parties are put upon by more powerful ones, then perhaps we should presumptively apply protective law rather than contract-enforcing law. If we conflicts scholars believe that courts are justified in promoting protective policies in both contracts and torts, then we need to develop a substantive defense of this inclination. If these policies indeed represent the "basic policies" underlying the fields of torts and contracts, we should explain why this is so. This would make conflicts law more continuous with the underlying substantive fields whose policies, after all, are our primary focus. These considerations should lead us to be explicit about the need for including better law in the list of factors in a third restatement.

19. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

20. On the importance of substantive justice in conflicts cases, see Weinberg, *supra* note 11, at 491; Louise Weinberg, *Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316 (1997).

21. See, e.g., Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998).

As a final example, consider the problem of enforcement of same-sex marriages.²² Let us assume some state, such as Vermont, recognizes same-sex marriages.²³ Two law students at school in Massachusetts go to Vermont to get married and then return to Massachusetts. What law applies? The two candidates are the place of celebration and the common domicile of the parties. Under now standard conflicts reasoning, one can argue that Massachusetts has strong interests in regulating marriages among its residents and that Vermont has weak interests or no interest in establishing marital policy for an out-of-state couple. This might even look like a false conflict; if two Massachusetts residents go to Vermont to execute a contract intended to be performed in Massachusetts, it is standard conflicts reasoning that Vermont has no interest in applying its contract law and the Massachusetts residents have no right to evade Massachusetts regulatory law simply by stepping across the border to clinch their deal.

On the other hand, one can argue that Vermont *does* have interests in applying its marriage law to marriages celebrated there. Marriages are not just any old contract; they create a status—one which can only be dissolved by a court judgment. Many people get married in states other than the state where they live. They would like to know what is required to get married. They look to local law to determine the formalities and the rules about what marriages are valid. Should they have to also look at the law of their domicile(s)? Suppose Massachusetts imposes a three-day waiting period after you get the marriage license before the ceremony can be performed and Vermont lets you get married the minute you obtain the certificate. Is this a mere formality or should a Massachusetts couple comply with the three-day waiting period to ensure that they will be considered legally married in both Vermont and Massachusetts? It seems obvious that prohibitions on same-sex marriage are substantive, and not just formalities, but you can see that the distinction between formality and substance can be slippery. To know how to get married and to be sure one has gotten married, a place of celebration rule is far more predictable than a rule that looks to domicile.

In addition, domicile is a far more slippery concept than place of celebration. Many of my law students could not say where they are domiciled, given the places they were born, the places they went to college, the places they intend to go to when they leave law school (initial clerkship or ultimate job), and their current attachment to the Commonwealth of Massachusetts. If we need to know whether someone is married or

22. See generally Beth A. Allen, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619 (1996); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551 (1993-94); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339 (1998); Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038 (1996).

23. See *Baker v. State*, 1999 WL 1211709 (Vt. 1999).

not, then both the factor of predictability and the protection of justified expectations would suggest adopting a place of celebration rule.

Consider also that it might be useful to have one's status of being married or not being married stay the same regardless of a change of domicile or movement from state to state. Imagine a Vermont couple, married in Vermont, moving to Massachusetts after being married in Vermont for thirty years. They might legitimately want to retain their marriage status when they move. They have substantial reliance interests built up around recognition of their marriage and they have some federally protected constitutional rights to move to another state. Determining when someone was attempting to evade Massachusetts law, rather than legitimately relying on Vermont law, would require a judgment about how long one would have to stay in Vermont in order to establish domicile and reliance interests on Vermont law to retain the marriage status before moving out of state. Predictability might well suggest that the law of celebration should control.

We therefore face a conflict between two strongly held choice-of-law policies. False conflict analysis points toward a domicile rule, but the protection of justified expectations and the need for predictability point toward a place of celebration rule.

What about better law? Traditionally, there has been a presumption of validity of marriage. On the other hand, many states apparently have strong policies against same-sex marriages. Should one's view of the merits of the issue affect the outcome? I think one's substantive views *are* very likely to affect the way one sees the conflicts issue whether or not one wishes them to do so. Someone like myself, who strongly believes that denial of the right to marry violates the constitutional rights of same-sex couples (for myriad reasons, including protection of liberty, privacy, freedom of religion, freedom of intimate association, and equal protection), will be receptive to the idea that there should be a presumption in favor of marriage and that this presumption should extend to same-sex couples. I am likely to be influenced by this predilection. Many judges are also likely to be influenced by their predilections. Those who oppose same-sex marriage on normative grounds are likely to happily embrace false conflict analysis or the virtues of the public policy exception to the traditional place of celebration rule, even if, in other situations, they are strong proponents of choice-of-law clauses because they favor freedom of contract and enjoy the predictability conferred on choice-of-law cases by the use of choice-of-law clauses.

It may be that we should suppress our natural inclinations to do justice, as we in the forum see it, and seek to generate rules that are neutral as to which law is better and are neutral as between forum and nonforum policy. Whether or not forum neutrality is called for (and I believe it is not), academic calls to ignore the substantive result are unlikely to eradicate the *actual* influence of substantive justice. It is all well and good for academics to tell judges to hide their eyes, but it will be difficult for decisionmakers to "pay no attention to the man behind the curtain." There is the joke that tells about the person who asks her friend not to think about elephants and, of course, all she can think about is herds and herds of elephants stampeding toward her.

More importantly, my own view is that considerations of substantive justice are of fundamental importance in conflicts cases, as in domestic cases. For this reason, I applaud judges who *do* think about the merits. In the case of same-sex marriage, where Vermont will have strong interests in vindicating the reliance interests of its couples who marry there and later move out of state and Massachusetts will have

strong interests in preventing its residents from evading the regulatory laws of Massachusetts, we face what I have previously called a real conflict. Not only do we face a conflict between the substantive policies of both states, but we face conflicting choice-of-law considerations. The state with the strongest interest in the marital status of a Massachusetts couple that goes to Vermont to marry may well be Massachusetts, but allowing a domicile rule to determine marriage validity has huge negative consequences on predictability, not only for same-sex marriages but for all marriages, given the difficulty of distinguishing formalities from substantive regulations. Ironically, the Supreme Court forced the nation to accept no-fault divorce by authorizing Nevada to tear apart couples that other states thought should not be torn asunder. It would seem odd indeed to require states to recognize foreign divorces while allowing them to ignore foreign marriages. Just as torts and contracts cases implicate protective policies which are determinative in conflicts litigation and scholarship, marriage law implicates substantive policies that we should keep at the forefront of our minds in deciding choice-of-law issues. For all these reasons, a third restatement of conflicts should finally pull back the curtain and recognize the legitimate, although contested, role of substantive justice (better law) in choosing the applicable law.